78-1862

IN THE

SUPREME COURT OF THE UNITED STATES

FRED N. WALKER, Petitioner,

v.

ARMCO STEEL CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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CITATIONS

Cases:

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The petitioner, Fred N. Walker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit enetered in this proceeding on February 14, 1979.

OPINION BELOW

The opinion of the Court of Appeals, 529 F.2d 1133, appears in the Appendix hereto. The Memorandum opinion of the District Court for the Western District of Oklahoma also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 14, 1979. Application for extension of time to file petition of writ of certiorari granted on May 16, 1979, extending the time to June 14, 1979. This petition was timely filed within that date. This Court's jurisdiction in invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

1. Whether in a federal diversity action, the question of when the action has been commenced is to be governed by the Federal Rules of Civil Procedure or by the state law of the district where suit is filed.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3
Commencement of Action - A civil action is commenced by filing a complaint with the Court.

Oklahoma Statutes Annotated, Title 12, § 97 (West Supp. 1978).

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him or a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivelant to commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to

procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60 days)".

STATEMENT OF THE CASE

On August 22, 1975, Fred Walker was seriously injured when a nail head fragment lacerated his right eye. This particular nail, manufactured by Armco Steel Corporation, shattered while Mr. Walker was trying to drive it into a cement wall. As a result of the accident, Fred Walker, pursuant to Rule 3 of the Federal Rules of Civil Procedure, commenced a lawsuit by filing the complaint on August 19, 1977, in the United States District Court for the Western District of Oklahoma.

On December 1. 1977, Armco Corporation was properly served with process, and on January 5, 1978, filed a Motion to Dismiss plaintiff's complaint for the reason that the statute of limitations barred the action.

Armco's Motion to Dismiss was sustained by order of District Court Judge Ralph Thompson on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision, basing its ruling on the holding in the case of Ragan v. Merchants Transfer & Warehouse Co., Inc. 377 U. S. 530 (1949). See p. 7 Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The decision below raises significant and recurring problems concerning the

application of the Federal Rules of Civil Procedure in a federal diversity action.

The decision by the Tenth Circuit in the case at bar is indicative of the dilemma that has confronted the Courts and parties to litigation as a result of the conflicting decisions of Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 (1949) and Hanna v. Plumer 380 U. S. 460 (1965). The problem can be more simply stated as: Should State or Federal procedure rules apply in a federal diversity action? Under Ragan the state procedure controlled and under Hanna Rule 3 of the Federal Rules of Civil Procedure was applied.

These two decisions are a part of a line of cases that began with Erie R. Co. v. Tompkins 326 U. S. 99 (1945). The thrust of these decisions was to prevent substantial enlargement of state-created rights by the federal courts. This was to ensure that the rights of the parties would be essentially the same whether the action is brought in a state forum or a federal forum.

Erie suceeded in insuring that the state substantive law be applied in the federal forum. But, the decisions of Hanna and Ragan have created a confusion in procedural law that will continue until this Court clarifies the status of Ragan.

The two decisions are in direct conflict. In Ragan the Court affirmed a decision by the Tenth Circuit that a Kansas statute, similar to the Oklahoma Statute in question, was an "integral part" of the state's statute of limitations and governed by the "outcome-determinative"

test of Guaranty Trust Co. v. York, supra. Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530, 523.

In 1965 the Court handed down the decision of Hanna, concerning conflicting state and federal procedural rules. The ruling was that when there was a conflict the federal rules should prevail. The reason being that the goal of the Federal Rules of Civil Procedure was to promote uniformity. The Court, stating that Erie had never been used to invalidate a federal rule of procedure, said:

"The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers- when there are 'affirmation' and when there is Congressional mandate (the rules) supported by constitutional authority."

Hanna v. Plumer, 380 U.S. 460, 473, citing Lumberman's Mutual Casualty Co. v. Wright, 322 P.2d 759, 764 (C.A. 5th Cir. 1963).

Thus, the situation is that Hanna did not expressly overrule Ragan but the decisions cannot be reconciled. In the case at bar the Oklahoma statute was held to be an "integral part" of the statute of limitations, in accordance with the Ragan decision. By the same token ,the Tenth Circuit Court of Appeals recognized that Hanna and Ragan are directly conflicting decisions which must be reconciled to achieve a uniform federal code of procedure.

2. The decision below conflicts with the decisions of other Court of Appeals

which have confronted the Hanna - Ragan dilemma.

Because the Ragan decision was simply distinguished by Hanna, the circuits are divided on the question of whether Ragan is still good law. The Tenth Circuit has decided to follow the majority in finding that since Ragan was not expressly overruled it must be continued to be considered good law. See Appendix, Witherow v. Firestone Tire and Rubber Co. 530 F.2d 160 (3rd Cir. 1976), Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971), Groninger v. Davison, 374 F.2d 638 (8th Cir. 1966).

On the other hand, in the Second Circuit, Hanna has been dogmatically followed. There the Court said: "Hanna requires consideration of the factors underlying the choice between the state and federal rule rather than the automatic application of Ragan." Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 605 (2nd Cir. 1968).

Furthermore, some of the circuits that follow Ragan today have done so reluctantly, expressing a preference for the federal rules and expressing hope that the Supreme Court would clear away the dilemma which exists as a result of the conflict between these two opinions. See Appendix and Prasher v. Volkswagen of America, Inc. 480 F.2d 947, 950 (3th Cir. 1973).

Justice Doyle, speaking for the Court below remarked that "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between Ragan and Hanna." The issues encompassed in the case at bar fall squarely within those "considerations" listed in Rule 19 (b) of the Rules of the

Supreme Court of the United States. Nearly every circuit has faced the Hanna/Ragan question - the need for a single clarifying decision from this Court is paramount.

CONCLUSION

For the aforementioned reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectively submitted,
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Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from
	)	the United
ARMCO STEEL CORPORATION,	)	States District
a corporation,	)	Court for the
	)	Western District
Defendant-Appellee.	)	of Oklahoma (D.C. No. 77-0816-T)

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter, Oklahoma City, Oklahoma, for the Plaintiff-Appellant.

Burton J. Johnson and Richard L. Keirsey of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calandar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines when a case is filed in the Federal Court. Is it a state law or federal question? The underlying problem is whether Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) or Hanna v. Plumer, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial Court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial Court ruled that Hanna v. Plumer, supra, did not expressly overrule Ragan v. Merchants Transfer & Warehouse Co., supra, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the Unites States District Court for the Western District of Oklahoma on August 19, 1977. Summons

was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a Motion to Dismiss Plaintiff's complaint asserting that the statute of limitations barred the action. The Motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial Court and which is here sought to be applied reads:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. At attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within sixty (60 days) of date of issuance, provided

the summons is issued within the limitations period. Although the summons here was shown to have been issued on time, the service was not completed within sixty (60 days), nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

> A civil action is deemed commenced by filing in the office of the Court Clerk of the proper Court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the Court Clerk. Where service is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons, addressed to the defendant or to the service agent if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to § 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the Court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial Court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a Federal Court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, supra, (the Oklahoma statute), is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one was well is to be gleaned from the statute as well as the cases. See, for example, Tyler v. Taylor, Okl. App., 478 P.2d 1214 (1977), and State ex rel. Roacher v. Caldwell, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma statute may be complex and even mysterious as compared with the federal provision in that it obligates the litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme

Court's decision in Ragan v. Merchants Transfer & Warehouse Co., supra, which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. Ragan, it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, supra), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this Court upheld the District Court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations".

Ragan, of course, religiously followed Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether Ragan must be applied here.

The Supreme Court's decision in Hanna v. Plumer, supra, gave promise that the corner had been turned so to speak, as far as Guaranty and Ragan continuing to dominate where the question is one of pure procedure such as we have here. Hanna construed a Massachusetts statute which had the same kind of complicated statute with respect to mode of service of process as we find here. In Hanna, as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was

rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished Ragan even though Ragan had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The Hanna opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as Ragan is based entirely upon the Guaranty Trust conception that outcome determinative is the answer, the refusal of the Court to apply this result in the Hanna decision is irreconcilable with that in Ragan.

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in Hanna, although it could be said to have shown dissatisfaction with Ragan, did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that Ragan has continued vitality. See 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that Ragan continues to be viable.

More recently this Court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was

in Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971). This action arose in Kansas as did Ragan, but the statute which was considered in Ragan had been modified. The reasoned opinion by Judge McWilliams concluded that Ragan was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in Ragan, so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule).

This Court has recently issued its opinion in Lindsey v. Dayton-Hudson Corp., No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that Ragan continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, Ragan was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the Ragan case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial Court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between Ragan and Hanna. So far

it has not done so, and until the Supreme Court acts we feel constrained to follow Ragan.

Accordingly, the judgment of the District Court is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER, Plaintiff, vs. ARMCO STEEL CORPORATION, Defendant.	)	Appeal from the United States District Court for the Western District of Oklahoma (D. C. No. 77-0816-5)

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. §1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; Lake v. Lietch, 550 P.2d 935 (Okl. 1976). Plaintiff admits that had this action been filed in state court and service not made until December

1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949); Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957). However, in Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in Hanna did not overrule Ragan v. Merchants Transfer & Warehouse Co., supra, in fact, Ragan was distinguised by the Hanna Court at page 469. However, following the Hanna decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencment of a suit. The majority rely on Ragan and determine commencement of suit by applying state law. Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3rd Cir. 1976); Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971); Groninger v. Davison, 364 F. 2d 638 (8th Cir. 1966); Sylvester v. Messler, 246 F. Supp 1 (E.D. Mich. 1965), aff'd 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011. See also Dial v. Ivy, 370 F.Supp. 833 (W.D. Okl. 1974), where the Court held that the state statute controlled, without commenting on Hanna. For the minority view, see Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971), the Tenth

Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because Hanna v. Plumer had "modified Ragan to the end that the federal rule, rather than the state statute, controls and fixes the time the action was commenced." (Chappell at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

"In our view of the matter, however, Ragan is distinguishable on its facts from the instant controversy and though we agree that Hanna governs, we need not here come to grips with the intriguing question as to whether Hanna overrules Ragan, a matter on which there is considerable differences of judicial thought." Id at 448.

The Court went on to distinguish the Ragan rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

"The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 (defining commencement of suit) is an 'integral part' of K.S.A. 60-501 and 60-513 (4) (statutes of

limitation). If we do so hold, then Ragan would control, assuming Ragan has not been modified, if indeed not overruled, by Hanna. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of Hanna." Chappell, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitations of Actions". Section 97 states that "an action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him . . ." (Emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, §97 is an integral part of the Oklahoma statute of limitations and would bar this suit if Ragan is still the law.

Having no express ruling from the Tenth Circuit on the effect of Ragan on these facts, this Court is free to threat the question as one of first impression. The Cou-t is persuaded that Hanna did not overrule Ragan. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the

Supreme Court not only did not overrule Ragan, but in fact distinguished it, in Hanna, persuades this Court that Ragan still controls. Even limiting Ragan to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of action is an integral part of the Oklahoma statute of limitations. The rule of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court a result not allowed after Erie.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this ____ day of April, 1978.

_____
United States District Judge